



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *O. R. v. Canada Employment Insurance Commission*, 2017 SSTADEI 298

Tribunal File Number: AD-16-647

BETWEEN:

O. R.

Appellant

and

Canada Employment Insurance Commission

Respondent

and

Mobile Maestria

Added Party

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Mark Borer

HEARD ON: July 26, 2017

DATE OF DECISION: August 7, 2017

DECISION

[1] The appeal is allowed. The matter will be returned to the General Division for reconsideration by a different member.

INTRODUCTION

[2] Previously, a member of the General Division dismissed the Appellant's appeal. In due course, the Appellant filed an application for leave to appeal with the Appeal Division and leave to appeal was granted.

[3] A teleconference hearing was held. The Commission, the Appellant, and the Employer each attended and made submissions.

THE LAW

[4] According to subsection 58(1) of the *Department of Employment and Social Development Act*, the only grounds of appeal are that:

- (a) the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
- (b) the General Division erred in law in making its decision, whether or not the error appears on the face of the record; or
- (c) the General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

ANALYSIS

[5] The facts of this case are highly unusual.

[6] In my leave to appeal decision, I noted that the General Division member wrongly stated that she was required to perform a standard of review analysis of the Commission's reconsideration decision. I also noted that if the member had indeed done so instead of

issuing a *de novo* decision, as she was obligated to do, then it would have been a serious violation of the Appellant's natural justice rights.

[7] The Commission, having reviewed the matter, admits that they have no explanation as to why the General Division member made reference to standard of review analysis.

However, they submit that regardless of what the member wrote in that paragraph, she held a proper *de novo* hearing and correctly stated the law (and her role) elsewhere in the decision. On this basis they argue that the error was not material and should be overlooked.

[8] The Appellant and the Employer made submissions on the merits of the underlying case, but not on the above issue.

[9] It is a basic legal principle that in coming to their decisions, Tribunal members must perform their statutory duties and also ensure that all parties are treated fairly.

Unfortunately, in this instance I cannot say for certain that this has happened.

[10] It may well be that the General Division member made a simple and innocent mistake by saying (in paragraph 21 of her decision) that she was applying a "standard of review [of] reasonableness with little deference" and that, as the Commission submits, the member's findings elsewhere are more representative of her actual legal reasoning and analysis.

[11] I must confess, however, that I find it hard to understand how this sentence could have ended up in the member's decision without representing the member's thinking. I can think of no time when a General Division member would apply standard of review analysis to a Commission decision, and therefore I am hard pressed to imagine that it was a simple typographical error, no matter how sound the remainder of the member's decision may be.

[12] This leads me to the inescapable conclusion that, in order to ensure that the correct law is considered and applied and that the natural justice and procedural rights of the parties are protected, a new hearing must be ordered. I come to this view reluctantly, but I can see no alternative given the unusual circumstances of this file.

[13] I also direct that, if at all possible, this file be assigned to a different General Division member.

CONCLUSION

[14] For the above reasons, the appeal is allowed. The matter will be returned to the General Division for reconsideration by a different member.

Mark Borer

Member, Appeal Division